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91-1756

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

KEVIN BAILEY,
Petitioner,

vs.

BETTY R. KEEP, KEEPHOLM FARM,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Has the petitioner's constitutional right to Due Process of Law been circumvented by the dismissal of the Ohio Supreme Court of the petitioner's action, *sua sponte*, for the reason that the petitioner had not exhausted his administratrive remedies?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion and Judgment of the Supreme Court of Ohio appears in the Appendix, as do the Decision and Journal Entry of the Court of Appeals, Tenth Judicial District, Ohio and the Referee's Decision for that District.

JURISDICTION

The Judgment of the Supreme Court of Ohio was entered on December 11, 1991. The Petitioner did seek rehearing. This Petition for Writ of Certiorari has been filed within ninety days of the January 29, 1992, Judgment. This Court has jurisdiction to grant this Petition under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional issues in this case arise under the Due Process Clause, Fifth and Fourteenth Amendments of the United States Constitution: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner, Kevin Bailey, was injured in 1986, while in the course of and arising from his employment with appellee Betty R. Keep (Keepholm Farm), when his clothing became entangled in a revolving power shaft running between a tractor and a wagon. His right leg was traumatically amputated and his left leg was severely injured. A workers' compensation claim for those injuries and others was allowed.

In late 1987, petitioner sought an additional award, alleging numerous violations of specific safety requirements ("VSSR") under Ohio Adm. Code Chapters 4121:1-3 and 4121:1-5. On April 19, 1989, a commission staff hearing officer denied the application, after finding that petitioner was not employed in a "construction trade" as defined in Ohio Adm. Code 4121:1-3-01(A) or a "factory" or "workshop" as contemplated by Ohio Adm. Code Chapter 4121:1-5.

On May 4, 1989, petitioner filed a complaint in mandamus in the Court of Appeals for Franklin County, alleging that the commission abused its discretion in denying him VSSR compensation. The appellate court disagreed and denied the writ.

Subsequently, the Supreme Court of Ohio, on its own motion, dismissed the petitioner's request for writ of mandamus for the reason that the petitioner had failed to exhaust his administrative remedies. Petitioner filed a timely motion for rehearing with the Ohio Supreme Court and that motion was promptly denied. Petitioner now requests that the Supreme Court of the United States review the decision of the Ohio Supreme Court and to reverse on the grounds that it violates the Due Process Clause of the Fifth and Fourteenth Amendments.

REASONS FOR GRANTING THE WRIT

Questions Presented:

On December 11, 1991, the Ohio Supreme Court, on its own motion, affirmed the judgment of the Franklin County Court of Appeals by deciding that the petitioner's failure to exhaust his administrative remedies precluded the court from addressing the issue on the merits. Specifically, the Ohio Supreme Court reasoned that under Ohio Administrative Code section 4121-3-20(G), a party may seek rehearing of a V.S.S.R. decision within thirty days of the order's receipt, and that since the petitioner had failed to request such rehearing, he had failed to exhaust his administrative remedies, and was, therefore, barred from the issuance of a writ of mandamus.

Petitioner in this case concedes that a party may seek a rehearing of a V.S.S.R. decision within thirty days of receipt of the order. However, section 4121-3-20(G) also limits the remedy of a new hearing to cases where new and additional proof not previously considered and relevant is submitted by motion, or where the previous order was based on an obvious mistake of fact. Section 4121-30-20(G) reads:

> (G) Within thirty days of the receipt of the order of the commission deciding the issues presented by the application, either party has the right to file a motion requesting a rehearing, and furnish a copy to the opposing party. The opposing party has thirty days in which to file an answer.
>
> (1) If the motion and answer are filed, a staff hearing officer, after the expiration of the answer time, shall review same under the following criteria:

> (a) In order to justify a rehearing of the commission's order, the motion shall be accompanied by new and additional proof not previously considered and relevant to the specific safety requirement violation.
>
> (b) A rehearing may also be indicated in exceptional cases where the order was based on an obvious mistake of fact.
>
> (2) If the motion for rehearing does not meet the criteria as outlined in paragraphs (G) (1) (a) and (G) (1) (b) preceding, the motion shall be denied without further hearing.

Section 4121-3-20(G) is quite clear in stating that a rehearing will not be granted when the motion does not meet the criteria set forth in 4121-3-20(G) (1)(a) or (b).

In the case at bar, the petitioner contended that a mechanized farm operation should be considered as a "workshop" or "factory" as contemplated by Ohio Administative Code Chapter 4121:1-5 or that the petitioner was employed in the construction trade as defined in Ohio Administrative Code Chapter 4121:1-3-01(A). To support his position, petitioner had contended throughout the appellate procedure that there is legislative intent to the effect that a large farm operation should be considered a workshop or factory or that the petitioner should be considered a construction employee.

At no time since the filing of his V.S.S.R. application had petitioner procured, or attempted to submit new or additional proof to support his position. Indeed, all the parties to this action concede that the petitioner suffered a terrible injury in the course of his employment. The only issue disputed among the parties to this case was whether or not a farm is a workshop or factory. There has never been a disagreement among the parties to this action as to medical evidence or as to the mechanics of

the power shaft which so severely crippled the petitioner. Therefore, there was never a need on petitioner's part to submit new medical evidence or evidence to further support the specific V.S.S.R. sections cited in petitioner's original V.S.S.R. application.

Additionally, petitioner had no reason to contend that the original V.S.S.R. order was based on an obvious mistake or fact. As petitioner was clearly outside the criteria for a new hearing as set forth by Ohio Administrative Code Section 4121-3-20(G), and, therefore, had no effectual remedy in further pursuing an administrative appeal, he went to the Court of Appeals requesting a writ of mandamus on the issue of the legislature's intent with regards to large farm operations.

In the case of *Kaufman v. Newburgh Heights*, 26 Ohio St. 2d 217, 55 Ohio Op. 2d 166 (1971), the Ohio Supreme Court stated:

> It is axiomatic that the doctrine of "failure to exhaust administrative remedies available" may be a defense, to an action in mandamus (*State ex rel. Schindel v. Rowe* (1971), 25 Ohio St. (2d) 47, 54 O.O.(2d) 173; *State ex rel. Foreman v. City Council* (1965), 1 Ohio St. (2d) 132, 30 O.O. (2d) 485; *State ex rel. Lieux v. Westlake* (1951), 154 Ohio St. 412, 43 O.O. 343); to an action for a declaratory judgment (*cf., Burt Realty Corp. v. Columbus* (1970), 21 Ohio St. (2d) 265, 50 O.O. (2d) 491); or to an action for damages (*Ladd v. New York Central Rd. Co.* (1960), 170 Ohio St. 491, 11 O.O. (2d) 245) only if interposed (*cf., Curtiss v. Cleveland* (1957), 166 Ohio St. 509, 3 O.O. (2d) 1 (1959), 170 Ohio St. 127, 10 O.O.(2d) 85), and if a remedy exists which is effectual to afford the relief sought.

In this case, there was no remedy which existed to afford the petitioner the relief sought by filing for a rehearing of the original V.S.S.R. order. Rather, such a

request would have resulted in a denial of rehearing, and, therefore, been futile, because the petitioner could not have met the threshold requirements of Section 4121-3-20(G).

The case of *Schindel v. Rowe*, 25 Ohio St. 2d 47, 54 Ohio Op. 2d 173, 266 N.E.2d 569 (1971), cited by the Ohio Supreme Court in its dismissal of petitioner's action, clearly indicates that the relator in that action had an effectual remedy to afford him the relief sought, that being the ability to file an application for a variance, before filing his request for writ of mandamus.

In this action, the petitioner had no adequate and effectual remedy in filing for a rehearing because of his failure to meet the criteria for such rehearing. Because the case at bar is a matter of interpretation of the State's Administrative Code, new and additional medical or mechanical evidence was not relevant.

The Ohio Supreme Court's own reasoning as expounded in the aforementioned cases establishes that the doctrine of "failure to exhaust administrative remedies" is only applicable if the appellant has an adequate remedy which is *effectual* to afford the relief sought. In this case, no such effectual remedy was available to the petitioner in requestiong a V.S.S.R. rehearing due to the nature of the issue presented. Therefore, petitioner was deprived of Due Process of Law by the arbitrary dismissal of his action.

The touchstone of Due Process is protection of the individual against arbitrary action of government. *Wolff v. McDonnell*, 418 U.S. 539 (1974). In the case at bar, the Ohio Supreme Court's dismissal of petitioner's request for writ of mandamus on its own motion for the reason that the petitioner had not exhausted his administrative

remedies was, indeed, arbitrary. A closer look at the facts of the case by the Ohio Supreme Court would have indicated to it that the petitioner had no adequate and effectual remedy at law in seeking a rehearing of the administrative decision.

CONCLUSION

The requirements to the Fourteenth Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular state, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government. *Minder v. Georgia*, 183 U.S. 559 (1902). In this case, the Ohio Supreme Court's decision is an example of an arbitrary exercise of the powers of the Government. The Ohio Supreme Court has, in effect, denied the petitioner the right to have this case heard on the merits and has arbitrarily dismissed this action for their reason that the petitioner had not exhausted his administrative remedies. Petitioner has been denied Due Process of Law under the Fourteenth Amendment because the administrative remedy, which the Supreme Court refers to, would have offered him no effectual remedy at law.

Respectfully submitted,

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APPENDIX

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Decided December 11, 1991)

Case No. 90-1015

THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. KEVIN BAILEY,
Appellant,

v.

INDUSTRIAL COMMISSION OF OHIO, ET AL.,
Appellees.

JUDGMENT ENTRY

APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Franklin County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellees recover from the appellant their costs herein expended; and that a mandate be sent to the Court of Appeals for Franklin County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

(Court of Appeals No. 89AP553)

/s/ THOMAS J. MOYER
Chief Justice

OPINION OF THE SUPREME COURT OF OHIO

(Decided December 11, 1991)

No. 90-1015

THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. KEVIN BAILEY,
Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO,
ET AL.,
Appellees.

[Cite as *State, ex rel. Bailey, v. Indus. Comm.* (1991), 62 Ohio St.3d 191.]

Workers' compensation—Application for additional award alleging violations of specific safety requirements denied—Mandamus not available [192] *when party did not request a rehearing available under Ohio Adm. Code 4121-3-20(G).*

(No. 90-1015—Submitted September 10, 1991—Decided December 11, 1991.)

APPEAL from the Court of Appeals for Franklin County, No. 89AP553.

Appellant, Kevin Bailey, was injured in 1986, while in the course of and arising from his employment with appellee Betty R. Keep (Keepholm Farm), when his clothing became entangled in a revolving power shaft

running between a tractor and a wagon. His right leg was traumatically amputated and his left leg was severely injured. A workers' compensation claim for those injuries and others was allowed.

In late 1987, appellant sought an additional award, alleging numerous violations of specific safety requirements ("VSSR") under Ohio Adm. Code Chapters 4121:1-3 and 4121:1-5. On April 19, 1989, a commission staff hearing officer denied the application, after finding that appellant was not employed in a "construction trade" as defined in Ohio Adm. Code 4121.1-3-01(A) or a "factory" or "workshop" as contemplated by Ohio Adm. Code Chapter 4121:1-5.

On May 4, 1989, appellant filed a complaint in mandamus in the Court of Appeals for Franklin County, alleging that the commission abused its discretion in denying him VSSR compensation. The appellate court disagreed and denied the writ.

This cause is now before this court upon an appeal as of right.

Joseph J. Bush III and *Louis Schiavoni*, for appellant.

Lee I. Fisher, Attorney General, and *Jeffrey W. Clark*, for appellee Industrial Commission.

Per Curiam. We are asked to determine whether a farm using power-driven machinery qualifies as a workshop, factory or construction industry under Ohio Adm. Code Chapers 4121:1-3 and 4121:1-5. We find *sua*

sponte, however, that appellant's failure to exhaust his available administrative remedies precludes us from reaching this question.

Under Ohio Adm. Code 4121-3-20(G), a party may seek rehearing of a VSSR decision within thirty days of the order's receipt. The present record contains no evidence of a rehearing request, indicating instead that appellant filed his mandamus petition just fifteen days after the staff hearing officer's order was mailed. Appellant's failure to exhaust his available administrative reme- [193]dies bars the issuance of a writ of mandamus. See *State ex rel. Schindel v. Rowe* (1971), 25 Ohio St.2d 47, 54 O.O.2d 173, 266 N.E.2d 569. Accordingly, the judgment of the court of appeals is affirmed, but for the reasons stated herein.

Judgment affirmed.

MOYER, *C.J.*, SWEENEY, HOLMES, DOUGLAS, WRIGHT, H. BROWN and RESNICK, *JJ.*, concur.

JOURNAL ENTRY OF THE COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT

(Filed April 26, 1990)

No. 89AP-553

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

STATE, EX REL. KEVIN BAILEY,
Relator,

v.

INDUSTRIAL COMMISSION OF OHIO,
and BETTY R. KEEP,
Respondents.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the memorandum decision of this court rendered herein on April 26, 1990, the objections to the report of the referee are overruled, and the report of the referee is approved and adopted by the court as its own, and it is the judgment and order of this court that the requested writ of mandamus is denied.

/s/ JOHN W. MCCORMAC
Judge

/s/ PEGGY BRYANT
Judge

JUDGE WILLIAM W. YOUNG,
of the Twelfth Appellate District,
sitting by assignment in the
Tenth Appellate District

MEMORANDUM DECISION OF THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT

(Rendered April 26, 1990)

No. 89AP-553

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

STATE, EX REL. KEVIN BAILEY,
Relator,

v.

INDUSTRIAL COMMISSION OF OHIO,
and BETTY R. KEEP,
Respondents.

MEMORANDUM DECISION

SCHIAVONI & SCHIAVONI CO., L.P.A., MR. JOSEPH J. BUSH III and MR. LOUIS SCHIAVONI, for relator.

MR. ANTHONY J. CELEBREZZE, JR., Attorney General, and MR. JEFFERY W. CLARK, for respondent Industrial Commisson of Ohio.

REMINGER & REMINGER CO., L.P.A. and MR. CHARLES P. ALUSHEFF, for respondent Betty R. Keep.

IN MANDAMUS ON OBJECTIONS
TO REFEREE'S REPORT

BRYANT, *J.*

Relator, Kevin Bailey, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio to vacate its order denying relator's application for an additional award for a violation of a specific safety requirement ("VSSR"), and to issue an order granting the award in [2] accordance with the evidence stipulated by the parties from the Industrial Commission claim file.

Pursuant to Civ. R. 53, and Section 13, Lo. R. 11 of the Tenth Appellate District, this matter was referred to a referee, who on November 30, 1989, issued a report, including findings of fact and conclusions of law. Therein, the referee concluded that the commission had properly denied relator's application for a VSSR award, as relator's farm activities were not construction activities within the plain language of Ohio Adm. Code 4121:1-3-01 nor "workshop" activities under Ohio Adm. Code Chapter 4121:1-5.

Accordingly, the referee found that relator failed to demonstrate that respondent Industrial Commission of Ohio abused its discretion in denying his request for a VSSR award; and the referee recommended that this court deny relator's request for a writ of mandamus, as no clear legal right thereto has been shown.

Relator filed objections to the referee's report, specifically objecting "to the finding by the Referee in this matter that outdoor farm machinery is not governed by Chapter 4121:1-5 and Chapter 4121:1-3 governing workshops and factories and construction equipment."

However, relator's objections simply reargue the issue the referee addressed in her report. For the reasons set forth in the referee's report, we overrule relator's objections.

Having independently reviewed this matter pursuant to Civ. R. 53, we find that the referee has properly determined the salient facts and applied the appropriate law thereto. Hence, we adopt the referee's [3] report, including her findings of fact and conclusions of law. Pursuant to her recommendation, the requested writ of mandamus is denied.

Objections overruled;
writ denied.

McCORMAC and YOUNG, *JJ.*, concur.

YOUNG, *J.*, of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.

REFEREE'S REPORT, COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT

(Rendered November 30, 1989)

No. 89AP-553

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

STATE, ex rel. KEVIN BAILEY,
Relator,

v.

INDUSTRIAL COMMISSION OF OHIO,
and BETTY R. KEEP,
Respondents.

REFEREE'S REPORT

SCHIAVONI & SCHIAVONI CO., L.P.A., and MR. JOSEPH J. BUSH III and LOUIS SCHIAVONI, for relator.

MR. ANTHONY J. CELEBREZZE, JR., Attorney General, MR. MICHAEL L. SQUILLACE and MR. JEFFERY W. CLARK, for respondent Industrial Commission of Ohio.

REMINGER & REMINGER CO., L.P.A. and MR. CHARLES P. ALUSHEFF, for respondent Betty R. Keep.

IN MANDAMUS

Relator, Kevin Bailey, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio to vacate its order denying relator's application for an additional award for a violation of a specific safety requirement (VSSR) and to issue an order granting the award, in accordance with the evidence stipulated by the parties from the Industrial Commission claim file.

[2] *Findings of Fact:*

1. On October 15, 1986, relator, Kevin Bailey, was injured in the course of and arising out of his employment with respondent Betty R. Keep, when his right leg was caught in a piece of farm machinery.

2. Relator filed an application for workers' compensation and benefits which was recognized for "amputation right leg; crushed left lower leg; numbness right arm, right middle finger; chipped and cracked teeth" in claim number 86-33222.

3. On November 25, 1987, relator filed an application for additional award for VSSR, followed by an amended application filed on August 2, 1988.

4. On March 21, 1989, relator's application was heard by a hearing officer of the Industrial Commission who issued an order which states in pertinent part:

> "It is the finding of the Hearing Officer that this claim has been recognized for amputation right leg; crushed left lower leg; numbness right arm, right middle finger; chipped and cracked teeth.
>
> "It is the finding of the Hearing Officer that the claimant sustained the injuries of record when his

clothing became entangled in an open turning power shaft running between a tractor and a wagon which stood in an open field.

"It further is found that the claimant was not involved in the construction trade as defined in Rule 4121:1-3-01(A); therefore, all related subsections set forth in his VSSR application are denied.

"Finally, it is found that the claimant was not working in either a 'workshop' or 'factory' at the time of his injury; therefore, no violation is found of the subsections of Rule 4121:1-5 which [3] the claimant cited in his VSSR application. Webster's New World Dictionary (Second College Edition, 1978) defines 'factory' as 'a building or buildings in which things are manufactured'. Since the claimant was not injured in a building, but rather in an open field, this term does not apply. Black's Law Dictionary (Fourth Edition Revised, 1968) defined 'workshop' as 'a room or place where power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise'. York Temple Country Club v. I.C. and Jamieson, 10th Ct of App. (1985), stated that the '"shop" portion of "workshop" connotes some form of enclosure', so an open field would not apply.

"In light of the foregoing, the claimant's VSSR application is denied."

Relator commenced the instant action in mandamus on May 4, 1989, alleging that respondent Industrial Commission abused its discretion in denying his application for a VSSR award.

Conclusions of Law:

In making a VSSR award, the commission must determine that a claimant's injury resulted from the employer's failure to comply with a specific safety requirement. Section 35, Article II, Ohio Constitution;

State, ex rel. Haines, v. Indus. Comm. (1972), 29 Ohio St. 2d 15. This is a factual determination, within the final jurisdiction of the commission, subject to correction in mandamus only upon a showing of an abuse of discretion. *State, ex rel. Allied Wheel Products, Inc., v. Indus. Comm.* (1956), 166 Ohio St. 47. Where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus will not lie. *State, ex rel. Burley, v. Coil Packing, Inc.* (1987), 31 Ohio St. 3d 18. In the instant case, relator has asserted violations of the specific safety requirements contained in Ohio Adm. Code [4] Chapter 4121:1-5 governing all workshops and factories and Ohio Adm. Code Chapter 4121:1-3 governing construction, contending that these provisions apply to outdoor farm machinery.

The specific provisions allegedly violated state in pertinent part:

Ohio Adm. Code 4121:1-3-05:

"(E) Shafts.

"(1) Revolving shafting.

"(a) All revolving shafting and couplings thereof, located seven feet or less above the floor, platform or ground level, and exposed to contact shall be guarded.

"(b) Ends of shafting, where exposed to contact, shall present a smooth edge and end, and shall not project more than one-half of the diameter of the shaft unless guarded by non-rotating caps or safety sleeves.

"(2) Universal joints.

"Universal joints where exposed to contact shall be guarded.

"(3) Unused keyways.

"Unused keyways where exposed to contact shall be filled or covered.

"(4) Set screws, keys and other projections.

"Set screws, keys and other projections, protruding beyond the surface of revolving parts, where exposed to contact, shall be guarded.

"(5) Revolving face plates and chucks.

"Revolving face plates and chucks shall be cylindrical with no projecting parts on the rim unless such projecting parts are guarded. This does not apply to those face plates and chucks revolving less than five revolutions per minute.

[5] "***

"(G) Machinery control.

"(1) Disengaging from source of power.

"A stopping device shall be provided at each machine, within easy reach of the operator, for disengaging it from its source of power.

"***

"(4) Treadles or extensions.

"Treadles or extensions for starting machinery shall be so located or guarded as to minimize accidental starting or tripping of the machinery.

"***

"(J) Feed rolls.

"Power driven feed rolls, when exposed to contact, shall be guarded at the pinch points."

Ohio Adm. Code 4121:1-3-06:

"(B) Definitions.

"***

"(3) 'Motor vehicles' (as covered by this rule) means all those vehicles that operate within an off-highway jobsite, not open to unrestricted public traffic."

Ohio Adm. Code 4121:1-5-04:

"(A) Scope.

"Rule 4121:1-5-04 applies to mechanical power transmission apparatus and facilities to transmit power to operating equipment or machine tools. Rule 4121:1-5-04 shall not be construed as being applicable to power transmission facilities located within the frame of the equipment and exposure is necessary to its operation or adjustment.

"***

[6] "(E) Shafts, collars, couplings and flywheels.

"(1) Guarding or horizontal shafting.

"(a) All exposed parts of horizontal shafting seven feet or less from floor or working platform, excepting runways used exclusively for oiling or running adjustments, shall be protected by a stationary casing enclosing shafting completely or by a trough enclosing sides and top of sides and bottom of shafting as location requires.

"***

"(2) Guarding vertical and inclined shafting.

"Vertical and inclined shafting seven feet or less from floor or work platform, excepting maintenance runways, shall be guarded in accordance with appendix 1.

"(3) Projecting shaft ends.

"(a) Projecting shaft ends shall present a smooth edge and end and shall not project more than one-half the diameter of the shaft unless guarded by nonrotating caps or safety sleeves.

"***

"(4) Set screws, keys and other projections.

"Set screws, keys and other projections, protruding beyond the surface of revolving parts shall be guarded.

"(5) Collars and couplings.

"***

"(b) Couplings.

"Shaft couplings shall be so constructed as to present no hazard from bolts, nuts, set screws, or revolving surfaces. Bolts, nuts, and set screws will, however, be permitted where they are covered with safety sleeves or where they are used parallel with the shafting and are countersunk or else do not extend beyond the flange of the coupling.

"(6) Universal joints.

[7] "Universal joints shall be guarded.

"(7) Revolving face places and chucks.

"Revolving face plates and chucks shall be cylindrical with no projecting parts on the rim unless such projecting parts are guarded. This does not apply to those face plates and chucks revolving less than five revolutions per minute."

Ohio Adm. Code 4121:1-5-05:

"(D) Machinery control.

"(1) Disengaging from power supply.

"Means shall be provided at each machine, within easy reach of the operator, for disengaging it from its power supply. This shall not apply to rolling departments of iron and steel mills nor to electrical power generation or conversion equipment.

"(2) When machines are shut down.

"The employer shall furnish and the employees shall use a device to lock the controls in the 'off' position

or the employer shall furnish and the employee shall use warning tags when machines are shut down for repair, adjusting, or cleaning.

"(3) Mechanical belt shifters.

"Tight and loose pulleys shall be equipped with mechanical belt shifters.

"(a) Cone pulley drive belts.

"Cone pulley drive belts more than two and one-half inches in width shall be equipped with a mechanical belt shifter permanently attached. Cone pulley drive belts two and one-half inches or less in width and not equipped with metallic fasteners, are exempt from this requirement.

"(b) Where any part of the lower cone pulley is seven feet or less above the floor, the belt and pulley shall be guarded.

"(4) Treadles or extensions.

"Treadles or extensions for starting machinery shall be so located or guarded as to minimize accidental tripping."

[8] As previously noted, the commission determined that relator was not involved in the construction trade as defined in Ohio Adm. Code 4121:1-3-01(A) and was not working in either a "workshop" or "factory" within the meaning of Ohio Adm. Code Chapter 4121:1-5, since claimant was working in an open field at the time of his injury.

As pertinent herein, Ohio Adm. Code 4121:3-01 states as follows:

"(A) Scope.

"The purpose of this code is to provide safety for life, limb and health of employees engaged in construction activity. In cases of practical difficulty or unnecessary hardship, the industrial commission

of Ohio may grant exceptions from the literal requirements of this code to permit the use of other devices or methods when it is clearly evident the equivalent protection is thereby secured.

"Activities within the scope of this code generally referred to herein as 'construction', include the demolition, dismantling, excavation, construction, erection, alteration, repair, painting, decorating, glazing, cleaning, and pointing of buildings and other structures and the installation of machinery or equipment and all operations in connection therewith; the excavation, construction, alteration and repair of subways, sewers, tunnels, trenches, caissons, conduits, pipelines, roads and all operations pertaining thereto; the moving of buildings, signs, and other structures, and to the construction, alteration, repair, or removal of wharfs, piers, abutments, or any other construction, alteration, repair, or removal work carried on, in, about, or over water.

"This code covers construction activities of employees whose employer engages in such work as its principal business. It also covers employees of other employers when the activities are performed in the course of new construction or substantial reconstruction of all or part of an existing structure, as well as substantial demolition or razing of an existing structure, but does not cover employees of such other employers when the activities are performed in the ordinary course of maintenance work."

[9] Relator argues that he has been denied a VSSR award based solely upon the commission's technical application of the terms "workshop," "factory" and "construction," there being no evidence in the record to refute the fact that he was injured in an open running shaft that should have been guarded and should have had access to a source to disengage the power of the

turning shaft. Although relator admits that there is no specific safety requirement governing farm machinery, relator contends that the term "workshop" can be construed to encompass a farm where machine-driven farm instruments are used. Relator suggests that a farm falls within the meaning of "workshop" as defined in Black's Law Dictionary (4th Ed. Rev. 1968) as "*** a room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise," in that relator was employed on a farm where power machinery was used both inside and outside the building structure. In this regard, relator submits that a farm is not much different from a steel mill or fabricating plant where employees work both inside and outside.

In weighing relator's arguments, the referee is guided by the principles of statutory construction as well as the rules established by the courts of Ohio regarding the interpretation of a safety regulation. In this regard, R.C. 1.42 provides that:

> "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. ***"

This provision is particularly applicable to a VSSR award which "*** is deemed a penalty to the employer subject to the rule of strict construction with all reasonable doubts concerning the interpretation of the [10] safety standard to be construed against the applicability of the standard to the employer. ***" *State, ex rel. Watson, v. Indus. Comm.* (1986), 29 Ohio App. 3d 354, 358. Moreover, in order to justify an additional award there must be a violation of a specific, as opposed to general, requirement. The specificity aspect of a safety

regulation was addressed in *State, ex rel. Metal Products v. Indus. Comm.* (1980), 61 Ohio St. 2d 280, wherein the court stated:

> "*** To be constitutional under Section 35, Article II of the Constitution of Ohio, a specific safety requirement must prescribe specific and definite requirements or standards of conduct which are of a character plainly to apprise an employer of his legal obligations toward his employees. *State, ex rel. Trydle, v. Indus. Comm.* (1972), 32 Ohio St. 2d 257." *Id.* at 281.

Applying the foregoing principles to the instant action leads this referee to conclude that the commission properly denied relator's application for a VSSR award. Clearly, relator was not engaged in construction activities within the plain language of Ohio Adm. Code 4121:1-3-01. Indeed, relator does not seriously argue otherwise. With respect to the relator's argument premised upon the analogy of a farm to a "workshop" in Ohio Adm. Code Chapter 4121:1-5, this argument ignores the constitutional prohibition against the imposition of a penalty upon an employer for a violation of a safety standard which fails to prescribe standards of conduct which are of a character plainly to apprise an employer of his legal obligations toward his employees. *Metal Products, supra.* Relator's argument further disregards the rule of strict construction regarding the interpretation of safety standards which may result in a penalty to the employer if violated. *Watson, supra.* When subjected to the rule of strict construction, with all reasonable doubts concerning the [11] interpretation of the safety standard to be construed against the applicability of the standard, the referee finds that the "workshop" portion of Ohio Adm. Code Chapter 4121:1-5 does not apply to an open field on a farm. Had it been so intended, Ohio Adm. Code 4121:1-5 could easily have

been made applicable to the more generic term "workplaces" instead of "workshops." See *State, ex rel. York Temple Country Club, Inc. v. Indus. Comm.* (Apr. 18, 1985), Franklin App. No. 84AP-818, (Memorandum Decision). Although relator was the victim of a most unfortunate accident, acceptance of relator's arguments in this regard would result in judicial expansion of ths scope of a safety regulation, which this court cannot do. *State, ex rel. Cummingham v. Indus. Comm.* (1987), 30 Ohio St. 3d 73.

For all of the foregoing reasons, the referee finds that relator has failed to demonstrate that respondent Industrial Commission abused its discretion in denying his request for a VSSR award and, accordingly, the referee recommends that this court deny relator's request for a writ of mandamus, as no clear legal right thereto has been shown.

/s/ MARIE FURJANIC
Referee

ENTRY OF THE SUPREME COURT OF OHIO EXTENDING TIME TO FILE MOTION FOR REHEARING

(December 24, 1991)

No. 90-1015

THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. KEVIN BAILEY,
Appellant,

v.

INDUSTRIAL COMMISSION OF OHIO, ET AL.,
Appellees.

ENTRY

On written request of counsel for appellant it is ordered that the time for filing motion for rehearing is hereby extended to January 2, 1992.

/s/ THOMAS J. MOYER
Chief Justice

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING

(Dated January 29, 1992)

No. 90-1015

THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. KEVIN BAILEY,
Appellant,

v.

INDUSTRIAL COMMISSION OF OHIO ET AL.,
Appellees.

REHEARING ENTRY

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 89AP553)

/s/ THOMAS J. MOYER
Chief Justice

OHIO ADMINISTRATIVE CODE
SECTION 4121-3-20(G)

* * * * *

(G) Within thirty days of the receipt of the order of the commission deciding the issues presented by the application, either party has the right to file a motion requesting a rehearing, and furnish a copy to the opposing party. The opposing party has thirty days in which to file an answer.

(1) If the motion and answer are filed, a staff hearing officer, after the expiration of the answer time, shall review same under the following criteria:

(a) In order to justify a rehearing of the commission's order, the motion shall be accompanied by new and additional proof not previously considered and relevant to the specific safety requirement violation.

(b) A rehearing may also be indicated in exceptional cases where the order was based on an obvious mistake of fact.

(2) If the motion for rehearing does not meet the criteria as outlined in paragraphs (G) (1) (a) and (G) (1) (b) preceding, the motion shall be denied without further hearing.

Supreme Court, U.S.
FILED
JUN 26 1992
OFFICE OF THE CLERK

(2)

NO. 91-1756

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

KEVIN BAILEY,

PETITIONER,

vs.

BETTY R. KEEP, KEEPHOLM FARM

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE REQUIREMENT THAT THE PETITIONER EXHAUST THE AVAILABLE ADMINISTRATIVE REMEDIES PRIOR TO SEEKING JUDICIAL REVIEW IS IN VIOLATION OF DUE PROCESS?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Kevin Bailey, the petitioner, Betty R. Keep, Keepholm Farms and the Industrial Commission of Ohio.

REASONS FOR DENYING THE WRIT

Petitioner has requested that this Court review a determination of the Supreme Court of Ohio. This determination held that before court review of an administrative decision can occur, the person seeking such review must first exhaust the available administrative remedies.

This Court should decline to review this case because the decision sought to be reviewed involves a question as to whether the state court properly applied a state statute to the facts of the case. It is submitted that no procedural nor substantive due process rights are implicated in this decision. The state court in its decision neither decided a federal question in a manner in conflict with another court nor did the state court decide an important federal question undecided by this Court.

Petitioner was injured in the course of and arising out of his employment. Petitioner applied for and received benefits under the workers' compensation laws of the State of Ohio. Thereafter, Petitioner applied for an additional award for the violation of a specific safety requirement.

Compensation for specific safety requirement violations under the state workers' compensation system is based on Article II, Section 35 of the Ohio Constitution. This provision vests exclusive jurisdiction in the Industrial Commission of Ohio to determine specific safety requirement violations and provides in pertinent part that the Industrial Commission has " . . . full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees . . . and its decision shall be final."

Recovery of an award for violation of a specific safety requirement is predicated upon proof of a violation and a casual connection between the violation and injury. *State, ex rel. Watson v. Industrial Commission,* 29 Ohio App. 3d

354, 505 N.E. 2d 1015 (1986). As an award of this nature is in the form of a penalty against the employer, the specific safety requirements are subject to strict construction. See, *State, ex rel. Sanchez v. Industrial Commission,* 18 Ohio St. 3d 46, 479 N.E. 2d 864 (1985). Further, the specific safety requirements must be drafted in a manner which will forewarn the employer and clearly establish a standard which must be followed. *State, ex rel. Howard Engineering and Manufacturing Company v. Industrial Commission,* 148 Ohio St. 165, 74 N.E. 2d 201 (1947).

As noted by the state supreme court:

> The term, 'specific requirement' as used in Art. II, §35 of the constitution of Ohio, does not comprehend a general course of conduct or general duties or obligations flowing from the relationship of employer and employee, but embraces such lawful, specific and definite requirements or standards of conduct as are prescribed by statute or by orders of the industrial commission, and which are of a character plainly to apprise an employer of his legal obligation toward his employees.

State, ex rel. Trydle v. Industrial Commission, 32 Ohio St. 2d 257, 291 N.E. 2d 748 (1972); *State, ex rel. Holdosh v. Industrial Commission,* 149 Ohio St. 179, 78 N.E. 2d 165 (1948). Accordingly, courts have declined to apply the safety requirements of one industry to that of another. See, *State, ex rel. Sorrells v. Mosier Tree Service,* 69 Ohio St. 2d 341, 432 N.E. 2d 197 (1982).

In the instant, case an administrative hearing officer determined that a specific safety requirement violation had not occurred and denied the application for an additional award. The determination of the hearing officer also apprised Petitioner that he could seek a rehearing pursuant to rule 4121-3-20(G) of the Ohio Administrative Code.

Petitioner did not seek a rehearing. Instead, he filed an action in mandamus in the Court of Appeals of Ohio, Tenth Appellate District.

The state supreme court held that Petitioner must first exhaust his available administrative remedies, in this case a motion for rehearing, prior to seeking court intervention.

The exhaustion of administrative remedies mandates "that absent compelling circumstances, the avenues nearest and simplest should be pursued first." *Moore v. City of East Cleveland,* 431 U.S. 494 (1977). In the instant case Petitioner offers no compelling circumstances for his failure to pursue his administrative remedies. Therefore, relief was properly denied.

Conclusion

Petitioner has failed to demonstrate the manner in which a state court's determination of the applicability of a state statute implicates an important federal question. Accordingly, the petition for writ of certiorari must be denied.

Respectfully submitted,

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